A

CHONG BOON SIM v. PP

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
ROHANA YUSUF JCA
HAMID SULTAN ABU BACKER JCA
B [CRIMINAL APPEAL NO: Q-05-121-05-2012]
12 DECEMBER 2014

CRIMINAL LAW: *Kidnapping Act 1961 – Section 3 – Offence of kidnapping – Appeal against conviction and sentence – Grounds of appeal – Whether charge based*
C *on joint charge or on common intention – Failure to call material witness – Whether absence of witness explained – Whether fatal to prosecution's case – Evidence Act 1950, s. 114(g)*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Grounds of appeal – Whether charge based on joint charge or on common intention*
D *– Whether charge defective and incurable – Whether ingredients to be proven in joint charge and charge with common intention different – Penal Code, s. 34*

EVIDENCE: *Adverse inference – Failure to call material witness – Whether prosecution had discretion in calling of witnesses – Whether adverse presumption should be invoked against prosecution – Evidence Act 1950, s. 114(g)*

E

The appellant and two others, namely Ah Boy and Ah Ti/Ah Fatt ('Siong Siaw Fatt') who were still at large, were charged and tried for an offence under s. 3 of the Kidnapping Act 1961. However, the charge against Siong Siaw Fatt was later withdrawn. The trial judge convicted the appellant and imposed a sentence of life imprisonment and six strokes of whipping. On
F appeal, the appellant contended that the charge preferred against him had an incurable defect as the words 'bersama-sama' in the charge denoted a joint charge but when it was to be read with s. 34 of the Penal Code, it would be a charge pursuant to common intention. The appellant contended that the ingredients to be proven in a joint charge and that of a charge with common
G intention were different. The appellant further argued that Siong Siaw Fatt was someone, strictly speaking, not at large and could testify on his involvement in the pursuit of common intention with the appellant. However, despite having information about Siong Siaw Fatt, the prosecution made no attempt to bring Siong Siaw Fatt to testify in court and was also not
H offered to the defence. As such, the appellant argued that such failure attracted the invocation of s. 114(g) of the Evidence Act 1950 against the prosecution and was fatal to the prosecution's case.

Held (allowing appeal; setting aside conviction and sentence)
Per Rohana Yusuf JCA delivering the judgment of the court:

I

(1) The charge against the appellant as worded, when read in context and as a whole, would refer to an offence of common intention to commit an offence of kidnapping. It was clear that the words 'bagi mencapai matlamat bersama' and the reference to s. 34 of the Penal Code meant

that it was a charge in furtherance of a common intention to kidnap the victim for the purpose of obtaining ransom. Therefore, it was not a joint charge but a charge against the appellant together with two others who had a common purpose to execute a common object. (para 18)

(2) Although the prosecution had a discretion as to who should be called as witness as well as who was not to be called as witness, the prosecution must explain why a material witness was not called to give evidence or offered to the defence. The discretion to call a witness by the prosecution must be calculated to further the interest of justice and at the same time giving a fair trial to the defence. The unexplained absence of Siong Siaw Fatt and the non-offering of him to the defence attracted the presumption under s. 114(g) of the Evidence Act 1950. (paras 26 & 27)

(3) The charge against the appellant was a charge of kidnapping in furtherance of common intention with another two still at large. However, Siong Siaw Fatt was not at large. No explanation was made on any attempt to trace Siong Siaw Fatt and no offer was made to the defence of this material witness. Siong Siaw Fatt was the best evidence to prove common intention as per the charge. There being no attempt by the prosecution to bring him to court despite having information on him had prejudiced the case of the defence and it was fatal to the prosecution's case. (para 28)

Bahasa Malaysia *Translation Of Headnotes*

Perayu dan dua yang lain, iaitu Ah Boy dan Ah Ti/Ah Fatt ('Siong Siaw Fatt') yang masih bebas, dituduh dan dibicarakan atas suatu kesalahan di bawah s. 3 Akta Penculikan 1961. Walau bagaimanapun, pertuduhan terhadap Siong Siaw Fatt kemudiannya telah ditarik balik. Hakim bicara telah menyabitkan perayu dan mengenakan hukuman penjara seumur hidup dan enam kali sebatan. Atas rayuan, perayu menghujahkan bahawa pertuduhan terhadap perayu mempunyai kecacatan yang tidak boleh diperbaiki kerana perkataan 'bersama-sama' dalam pertuduhan menunjukkan pertuduhan bersama tetapi apabila ia dibaca dengan s. 34 Kanun Keseksaan ('KK'), ia akan menjadi sesuatu pertuduhan berdasarkan niat bersama. Perayu menghujahkan bahawa elemen-elemen yang perlu dibuktikan dalam pertuduhan bersama dan pertuduhan niat bersama adalah berbeza. Perayu juga menegaskan bahawa Siong Siaw Fatt, pada asasnya, bukan tidak boleh dicari dan boleh memberikan keterangan mengenai penglibatannya dalam perlaksanaan niat bersama dengan perayu. Tetapi, walaupun pihak pendakwaan mempunyai maklumat mengenai Siong Siaw Fatt, tidak ada sebarang usaha yang dibuat oleh pihak pendakwaan untuk membawa Siong Siaw Fatt untuk memberi keterangan di mahkamah dan Siong Siaw Fatt juga tidak ditawarkan kepada pihak pembelaan. Oleh itu, perayu menghujahkan bahawa s. 114(g) Akta Keterangan 1950 harus digunapakai terhadap pihak pendakwaan dan memudaratkan kes pendakwaan.

Diputuskan (membenarkan rayuan; mengenepikan sabitan dan hukuman) Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Pertuduhan terhadap perayu apabila dibaca dalam konteks dan secara keseluruhannya akan merujuk kepada kesalahan niat bersama untuk melakukan suatu kesalahan penculikan. Adalah jelas bahawa perkataan 'bagi mencapai matlamat bersama' dan rujukan kepada s. 34 KK membawa maksud bahawa ia adalah pertuduhan bagi mencapai niat bersama untuk menculik mangsa bagi tujuan mendapatkan wang tebusan. Oleh itu, pertuduhan terhadap perayu bukanlah pertuduhan bersama tetapi pertuduhan terhadap perayu bersama-sama dengan dua orang lain yang mempunyai niat bersama untuk melaksanakan tujuan yang sama.

(2) Walaupun pihak pendakwaan mempunyai budi bicara berhubung siapakah yang harus dipanggil sebagai saksi dan juga siapa yang tidak patut dipanggil sebagai saksi, pihak pendakwaan harus menjelaskan mengapa saksi penting tidak dipanggil untuk memberikan keterangan atau ditawarkan kepada pihak pembelaan. Budi bicara untuk memanggil saksi oleh pihak pendakwaan harus dipertimbangkan mengikut keadilan dan pada masa yang sama memperuntukkan perbicaraan yang adil kepada pihak pembelaan. Ketiadaan Siong Siaw Fatt yang tidak dijelaskan dan kegagalan menawarkan beliau kepada pihak pembelaan akan menarik anggapan di bawah s. 114(g) Akta Keterangan 1950.

(3) Pertuduhan terhadap perayu adalah pertuduhan penculikan berikutan niat bersama dengan dua lagi yang masih bebas. Walau bagaimanapun, Siong Siaw Fatt adalah tidak bebas. Tiada penjelasan yang diberikan untuk mengesan Siong Siaw Fatt dan saksi material ini tidak ditawarkan kepada pihak pembelaan. Siong Siaw Fatt merupakan keterangan terbaik untuk membuktikan niat bersama seperti dalam pertuduhan. Kegagalan pihak pendakwaan untuk membawa Siong Siaw Fatt ke mahkamah walaupun mempunyai maklumat mengenai Siong Siaw Fatt telah memprejudiskan kes pihak pembelaan.

Case(s) referred to:

Ganesh Singh v. Ram Pooja (1869) 3 BLR 44 ***(foll)***
Ghazalee Kassim & Ors v. PP [2009] 4 CLJ 737 FC ***(refd)***
Lim Young Sien v. PP [1994] 2 SLR 257 ***(refd)***
Mimi Wong & Anor v. PP [1972] 1 LNS 88 HC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
PP v. Muhamad Nasir Shaharuddin & Anor [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408 HC ***(refd)***
PP v. Murugan Subramaniam & Ors [1996] 3 CLJ 921 HC ***(refd)***
R v. Russell-Jones [1995] 3 All ER 239 ***(refd)***
Samsudin v. PP [1962] 1 LNS 180 HC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 114(g)
Kidnapping Act 1961, s. 3
Penal Code, s. 34

For the appellant - Lim Heng Choo (Roger Chin with him); M/s Lim & Lim Advocs
For the respondent - Mahadhir Mohd Khairudin; DPP

[Editor's note: For the High Court judgment, please see PP v. Chong Boon Sim [2012] 1 LNS 833.]

Reported by Sandra Gabriel

JUDGMENT

Rohana Yusuf JCA:

[1] The appellant, Chong Boon Sim and two others, who are still at large, were charged and tried with an offence under s. 3 of the Kidnapping Act 1961 at the High Court in Kuching. He was convicted by the learned trial judge and sentenced to life imprisonment with six strokes of whipping.

[2] The appellant's appeal was heard before us on 16 April 2014. Thereupon we allowed the appeal, set aside the conviction and sentence and ordered that the appellant be accordingly acquitted.

[3] The case for the prosecution revealed the following facts. On 7 February 2010 at about 3pm Chong Chun Ming, the victim ("PW7"), received a call from the appellant's friend. PW7 was told to come and collect rental for a stall at Ming Ming Food Court, owing by the appellant to PW7. The appellant's friend told PW7 to meet them at Tasik Biru.

[4] PW7 together with his co-worker Bong Li Li ("PW8") arrived at Tasik Biru in a Toyota Camry bearing registration number QKH8929 (exh. P26) at 5pm on 7 February 2010. Upon arriving, PW7 and PW8 saw three persons sitting on the fence waiting for him. PW7 got out of the car, stood near the door while PW8 remained in his seat. The three persons approached PW7. They were later identified as the appellant and two other persons described as a man with tattoo ("Ah Boy") and a man who stood guard outside the car ("Ah Ti/Ah Fatt").

[5] PW7 further testified that Ah Boy and the appellant went near him while Ah Ti/Ah Fatt stood guard next to the car door where PW8 was seated and preventing PW8 from getting out. Soon as Ah Boy was near PW7, he took out a knife from an envelope and wanted to stab PW7. Upon seeing the knife PW7 grabbed hold of Ah Boy's knife-wielding hand. The appellant then, likewise took out a knife from his trousers' pocket and wanted to stab PW7.

[6] Fortunately however, they did not manage to stab PW7. Instead, Ah Boy and the appellant held PW7 and pushed him into the back seat of the car. Ah Ti/Ah Fatt then drove away the car with them inside. The

A appellant and Ah Boy tied up PW7's fingers with white cable tights. While at the back seat, the appellant and Ah Boy held PW7's head down so as to prevent him from looking out the window. At the same time, the appellant and Ah Boy tried to cover him with their bodies. They leaned their bodies on PW7's body so that people could not notice PW7.

B **[7]** PW7 testified that he did not dare fight back as the appellant and the other two were armed with knives. The three of them brought PW7 and PW8 to an empty house. At the empty house, they untied the cable tights on PW7's fingers. Then PW7's hands were held at his back and once again his fingers and toes were tied up with cable tights (exh. P11). PW8's hands C were held at the back and tied up with cable tights, as well. PW8's toes were also tied with cable tights (exh. P11). PW8 and PW7 were then made to sit with their backs facing each other and subsequently they were tied to each other with nylon string (exh. P8). (Exhibit P10) was used to blindfold PW7 and PW8. PW7's mouth was inserted with tissue papers.

D **[8]** A call was then made to PW7's mother ("PW5") using PW7's cell phone informing her that her son had been kidnapped. PW5 informed PW7's father ("PW6") of the telephone call she received. PW6 immediately called back PW7's telephone number, which was answered by one of the alleged kidnappers. The kidnapper demanded a sum of RM200,000 or they will E never see their son alive again. After the telephone call, the three persons left PW7 and PW8 in the empty house.

[9] Somehow both PW8 and PW7 managed to untie themselves. Soon as they set themselves free, they both ran out of the empty house towards the bushes nearby and they were eventually rescued by a man who lived opposite F the river.

[10] The appellant and the other two were not aware that PW7 and PW8 had escaped. They continued to call PW6 for the ransom and gave specific instructions as to the time and place for delivery of the same. However the delivery never took place. Apparently spooked by the presence of police G personnel at the scene, the kidnappers aborted their plans, never showing up at the location. The ransom therefore was never paid.

[11] There was no arrest after the incident. The appellant subsequently informed his family that he wanted to turn himself in and was then arrested H by PW10.

[12] The appellant was charged with the other two persons who are still at large. At the end of the prosecution's case, the learned High Court Judge found that *prima facie* case was made out and ordered the appellant to enter his defence.

I **[13]** The appellant raised his defence by testifying under oath. In his judgment the learned trial judge found that the appellant's defence was that he was completely ignorant of the kidnapping. The appellant claimed that he was under the impression that the whole incident was merely to collect debt.

The learned judge, in his judgment and on evidence before him, found nothing material in the defence that could raise reasonable doubt on the case of the prosecution. He further found in fact the defence of the appellant confirmed some aspects of the prosecution's case such as; the actual occurrences of some events as testified by PW7 and PW8 that Ah Boy took out a knife; that the appellant was helping to thwart PW7's resistance and preventing PW7 and PW8 from escaping.

[14] After scrutinising the defence evidence the learned trial judge found that the defence was a mere afterthought and failed to raise a reasonable doubt on the prosecution's case. The learned trial judge proceeded to make a finding of guilt on the appellant, convicted the appellant and imposed a sentence of life imprisonment and six strokes of whipping.

[15] In his grounds of appeal the appellant raised the following issues:

(i) The charge was defective;

(ii) The ingredients of the offence of kidnapping were not proven;

(iii) Common intention was not proven; and

(iv) Adverse inference was not invoked.

[16] Learned counsel for the appellant went at length to contend that the charge preferred against the appellant is defective because of the use of the words "bersama-sama" in the charge which according to him would denote a joint charge and not a charge in pursuant of a common intention. Before deliberating further on this issue, we find it convenient to reproduce the said charge below:

> Bahawa kamu bersama-sama dengan 2 orang yang masih bebas pada 07.02.2010 jam lebih kurang 5.30 petang, bertempat di sebuah rumah kosong, Jalan Sepaoh Off Jalan Sungai Pinang, Bau, Dalam Daerah Bau, dalam Negeri Sarawak, bagi mencapai matlamat bersama, dengan maksud menahan Chong Chun Mun (L) (KPT: 770604-13-6517) untuk wang tebusan berjumlah RM200,000.00 (Ringgit Malaysia Dua Ratus Ribu). Maka dengan itu, kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 3 Akta Culik 1961 dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[17] Learned counsel contended that the words "bersama-sama" in the first line above, would render the charge a joint charge but when it is to be read with s. 34 of the Penal Code it would be a charge in pursuant of common intention. Learned counsel relied on *PP v. Muhamad Nasir Shaharuddin & Anor* [1992] 4 CLJ 2028; [1992] 3 CLJ (Rep) 408; [1994] 2 MLJ 576 and *PP v. Murugan Subramaniam & Ors* [1996] 3 CLJ 921; [1996] 3 AMR 3156, to contend that the ingredients to be proven in a joint charge and that of the charge with common intention are different. For that reason learned counsel submitted, the charge against the appellant had an incurable defect.

[18] We find no merit in this argument. The charge against the appellant as worded, when read in context and as a whole, would refer to an offence of common intention to commit an offence of kidnapping. It is clear that the words "bagi mencapai matlamat bersama" and the reference to s. 34 means it is a charge in furtherance of common intention to kidnap the victim for the purpose of obtaining ransom. It is therefore not a joint charge but a charge against the appellant together with the two others who are still at large and who had a common purpose to execute a common object, namely, to kidnap PW7 for a ransom following the principle as laid down in *Ganesh Singh v. Ram Pooja* (1869) 3 BLR 44 (PC).

[19] While on the subject of common intention, we proceeded to deliberate on the issue raised by the appellant, *viz*; that the prosecution had failed to prove common intention. Learned Deputy Public Prosecutor ("DPP") countered by relying on the authority of *Ghazalee Kassim & Ors v. PP* [2009] 4 CLJ 737 and *Mimi Wong & Anor v. PP* [1972] 1 LNS 88; [1972] 2 MLJ 75, to say that common intention under s. 34 was made out in this case. Learned DPP pointed out that in evidence the appellant with two others, did participate in calling the victim to go to Tasik Biru and upon arrival threatened PW7, tied his hands, blindfolded him and confined both of them in an empty house.

[20] In this regard we are inclined to agree with the submission of learned counsel for the appellant that the prosecution had failed to call material witnesses to assist in the narration of the prosecution's case to prove common intention. We found the investigation officer ("IO") had testified the involvement of Siong Siaw Fatt ("Ah Fatt/Ah Ti") in this case. Learned DPP confirmed that, one of the two persons at large in the charge would be Ah Fatt/Ah Ti.

[21] The IO who testified as PW10, in his evidence (at pp. 191-192 of the appeal records vol. 2) said that, arising from the same incident, Siong Siaw Fatt ("Ah Fatt/Ah Ti") was arrested and remanded for seven days. Both Siong Siaw Fatt and the appellant were initially charged with an offence of robbery but they were both discharged not amounting to acquittal. Subsequently, they both were charged with an offence of kidnapping. This is also evidenced in the arrest report (exh. P18 dated 10 February 2010). However, the charge for kidnapping against Siong Siaw Fatt was withdrawn. The reason for the withdrawal of the charge, according to the IO, was because the victim PW7, failed to identify Siong Siaw Fatt affirmatively at the identification parade. However in PW10's testimony at p. 150 of the appeal records vol. 2, he stated that Siong Siaw Fatt was identified by the PW8 on 50/50 basis (see pp. 146 to 152 of the appeal record vol. 4) even though in the Identification Parade Form Folio (exh. P19C) stated that PW8 identified Siong Siaw Fatt.

[22] In view of the above facts we found it odd that the charge against the appellant was made with two others who are at large when in fact Siong Siaw Fatt was someone, strictly speaking, not at large. On the evidence found in the appeal records, there is no doubt that Siong Siaw Fatt was directly involved in the commission of the crime and would be able to testify on his involvement in the pursuit of common intention with the appellant.

[23] It was not in dispute that the prosecution made no attempt to explain in evidence why one of the persons charged with the appellant was not produced when it became clear on the facts that the police would have sufficient records on Siong Siaw Fatt to testify in the case. It was also common ground that Siong Siaw Fatt was not offered to the defence as witness.

[24] From these accounts we find it untenable for the charge on the accused to be with two other persons at large, when at least one of them was already charged but the same was subsequently withdrawn. We are of the view that for this reason the learned trial judge should have invoked s. 114(g) of the Evidence Act 1950 against the case for the prosecution. We are guided by the principle laid out by the Federal Court in *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433 which held that:

> While the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all necessary witness essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable doubt. At the very least, the prosecutor should make them available for cross-examination by the defence. If the prosecution failed to fulfil this duty, the accused must be acquitted.

[25] Given the involvement of Siong Siaw Fatt as well as the fact that he was charged with the appellant in furtherance of common intention in the commission of the offence of kidnapping, it is quite difficult to appreciate why he was not brought to court or at least offered to the defence. The prosecution in fact took a completely silent stand as to the existence of Siong Siaw Fatt.

[26] A witness is a material witness if his evidence is crucial and necessary to unfold either the prosecution or the defence case. On the facts of this case, we are of the view that s. 114(g) should have been invoked by the learned trial judge against the case of the prosecution. The position taken by the prosecution in this regard cannot be said to be a mere failure to obtain evidence, but amounted to withholding and suppression of evidence (see *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492). It is well settled that, provided there is no wrong motive, the prosecution has a discretion as to who should be called as a witness as well as who is not to be called as a witness (see *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1; [1995] 2 MLJ 433 and *Munusamy Vengadasalam v. PP* (*supra*)) but the prosecution must, in all fairness, explain why a material witness is not

called to give evidence or offered to the defence. The principle underlying this invocation is plain. The discretion to call a witness by the prosecution must be calculated to further the interest of justice at the same time giving a fair trial to the defence (see *R v. Russell-Jones* [1995] 3 All ER 239).

[27] The unexplained absence of Siong Siaw Fatt to testify and the non-offering of him to the defence would attract the presumption under s. 114(g) of the Evidence Act 1950. This presumption would not have arisen if the witness were offered to the defence as decided in *Samsudin v. PP* [1962] 1 LNS 180; [1962] MLJ 405. It is axiomatic that a witness who is not called by the prosecution should be offered to the defence (see *Lim Young Sien v. PP* [1994] 2 SLR 257). Chong Siew Fai CJ (Sabah and Sarawak) in *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233; [1996] 3 MLJ 560 stated succinctly, the non-inflexible rule on the invocation of s. 114(g), which he reiterated to be depending on the facts of each case.

[28] In the present appeal the charge against the appellant was a charge of kidnapping in furtherance of common intention with another two still at large. In evidence it is clear that one of the two, namely, Siong Siaw Fatt is not at large. He was remanded, charged but the same was later withdrawn. No explanation was made on any attempt to trace him and no offer was made to the defence of this material witness. We are of the view that this would have been an appropriate situation for the invocation of s. 114(g) against the prosecution. We are of the view that this witness is the best evidence to prove common intention as per the charge. There being no attempt by the prosecution to bring him to court despite having information on him had prejudiced the case of the defence and it is fatal.

[29] For the above reasons, it is our view that the conviction of the appellant would be rendered unsafe. We therefore allow the appeal by the appellant, set aside the conviction and sentence by the High Court and accordingly acquit and discharge the appellant.